



July 16, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3077

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149468.

The Texas Department of Human Services (the "department") received a request for information regarding the Castle Peak Hospice. You state that you have released some of the requested information to the requestor. You claim, however, that portions of the requested information are excepted from disclosure under section 552.101 of the Government Code and various confidentiality provisions. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that some of the documents at issue are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;

(4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;

(5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;

(6) on a form required by a federal agency if:

(A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;

(B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and

(C) the release of the information complies with any other federal requirement; or

(7) as provided by Section 142.0092.

You argue that the documents in Attachment C constitute reports, records, and working papers that were used or developed during a complaint investigation made under section 142.009(c) of the Health and Safety Code. Furthermore, you have provided no information that would allow us to conclude that any of the exceptions to confidentiality in section 142.009(d) apply in this instance. Based on your representations and our review of the submitted information, we conclude that the department must withhold Attachment C from the requestor pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.¹

Next, you contend that a portion of the federal form submitted as Attachment D, Form HCFA 2567, Statement of Deficiencies and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal regulations and section 142.009(d)(6) of the Health and Safety Code. Federal regulations require the department to release the HCFA 2567 forms, which contain a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). You explain that the

¹We therefore need not address the remaining arguments pertaining to Attachment C.

provider has offered comments in response to each evaluation and, therefore, has had a reasonable opportunity to review the report. Therefore, we agree that the department must withhold the identity of the provider's representative in Attachment D and that the Form HCFA 2567 is otherwise subject to release.

Next, you contend that a portion of the state form submitted as Attachment E, Form DHS 3724, Statement of Licensing Violations and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. As noted above, section 142.009(d) states that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency." Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release Form DHS 3724; however, you contend the department must withhold the facility representative's name and title. We disagree and conclude section 142.009(d)(5) of the Health and Safety Code does not apply to the facility representative's name and title in Attachment E. Therefore, the department must release this information to the requestor.

You further contend that portions of the information in Attachment E are made confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990).

For the most part, we agree that the information you have marked in Attachment E must be withheld from required public disclosure under section 159.002 of the Occupations Code. However, we have marked some information that you have redacted in Attachment E that is not information made confidential by section 159.002. This information must be released. In addition, we have marked additional information which must be redacted under section 159.002 prior to the release of Attachment E.

To summarize, we conclude that: (1) the department must withhold Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code; (2) the department must withhold the identity of the provider's representative in Attachment D pursuant to section 552.101 in conjunction with federal regulations and section 142.009(d)(6); (3) the remaining information in Attachment D must be released; (4) section 142.009(d)(5) of the Health and Safety Code does not apply to the facility representative's name and title in Attachment E; and (5) with the exception of the marked information that the department must withhold under section 159.002 of the Occupations Code, the information in Attachment E must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Karen A. Eckerle".

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref.: ID# 149468

Enc.: Submitted documents

c: Mr. Jay Harris
900 Bluebonnet Place
Denton, Texas 76209
(w/o enclosures)